

PROCEDURAL HISTORY

On March 31, 2009, a grand jury charged defendants in a six-count Indictment. Specifically, each defendant is charged with conspiracy to distribute 50 or more grams of cocaine base ("crack") in violation of 21 U.S.C. § 846 (Count One); two counts of possession with intent to distribute five or more grams of crack in violation of 21 U.S.C. § 841(a)(1) (Counts Two and Three); one count of possession with intent to distribute 50 or more grams of crack in violation of 21 U.S.C. § 841(a)(1) (Count Four); one count of possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1) (Count Five); and one count of possession of marijuana in violation of 21 U.S.C. § 844(a) (Count Six).

On July 9, 2009, defendant Delgado filed the within Motion to Suppress and Memorandum of Law. On September 25, 2009, defendant Girson Ortega filed a Motion to Join in the Co-defendant Jose Delgado's Motion to Suppress.¹ The Government's Answer to Defendants' Pre-Trial Motion for Suppression of Evidence was filed November 6, 2009.

On November 23, 2009, I conducted a hearing on defendants' motion to suppress. After presentation of evidence at the hearing, the parties requested leave to file supplemental

¹ By the accompanying Order, I grant defendant Ortega's motion to join in defendant Delgado's motion to suppress, and refer to the motion to suppress as "defendants' motion".

briefs on the matter before disposition of the motion to suppress. I granted that request, permitted the parties to file supplemental briefs with specific citations to the record, and scheduled closing arguments on the motion to suppress for March 19, 2010.²

On February 8, 2010, defendants filed a joint letter brief in support of their motion to suppress. On March 8, 2010, the government filed a supplemental brief titled Government's Response to Defendants' Pre-Trial Motion for Suppression of Evidence.

By Order dated March 19, 2010, and at the parties' request, I struck the closing argument and took the matter under advisement on briefs as of that date. Hence this Opinion.

FACTS

Based on the evidence presented by the parties at the hearing before me on November 23, 2009, I find the pertinent facts to be as follows.

On the evening of July 22, 2008, Reading Police Officers Darren Smith and Scott Anuszewski and Sergeant Bruce Monteiro were on patrol in Reading, Pennsylvania in an unmarked vehicle. The officers were looking for Khiry Boston, a suspect in an attempted murder case, and had received information from an

² See Notes of Testimony of the hearing conducted before me on November 23, 2009 in Allentown, Pennsylvania, styled "Pretrial Motions Hearing Before the Honorable James Knoll Gardner[,] United States District Court Judge" ("N.T."), at pages 182-188.

informant that day that Mr. Boston might be in a silver 2000 Lincoln LS vehicle with tinted windows.³ Previously, on July 7, 2008, Officer Smith had observed Mr. Boston in a silver Lincoln driven by defendant Ortega.⁴

Around 8 p.m. on July 22, 2008, the officers saw a silver Lincoln LS with tinted windows parked in front of a fire hydrant in the 200 block of West Greenwich Street, a high-crime area in Reading. The officers saw people inside the vehicle, but could not identify them because of the tinted windows.⁵

Sergeant Monteiro stopped the unmarked patrol vehicle near the Lincoln. Officers Smith and Anuszewski got out of the patrol vehicle and approached the Lincoln, with Officer Smith approaching the driver's side. When the driver, defendant Ortega, opened the window, Officer Smith smelled marijuana smoke.⁶ Khiry Boston was not in the vehicle.⁷

Officer Smith asked the occupants of the vehicle whether they had been smoking marijuana. The front-seat passenger, defendant Delgado, said that he had smoked marijuana earlier in the day and that the smell was on his clothing. The

³ N.T. 9-16, 33.

⁴ N.T. 31-32.

⁵ N.T. at 14, 17.

⁶ N.T. at 18, 25, 65.

⁷ N.T. at 55-56.

driver, defendant Ortega, was "stuttering and mumbling his words".⁸

Officer Smith noticed that the car was in reverse and asked defendant Ortega to put the car in park. Although defendant Ortega moved his hand toward the gearshift, he did not put the car in park right away. However, he did eventually put the car in park. Officer Smith observed that defendant Ortega had begun to sweat.⁹

At Officer Smith's direction, defendant Ortega stepped out of the car. Although defendant Ortega generally complied with the officer's directions, he attempted to conceal his left side by turning away (referred to as "blading"), and Officer Smith asked him several times to put his hands on the car.

At that time, Officer Smith patted defendant Ortega down for weapons.¹⁰ In the course of the pat-down, Officer Smith felt crack cocaine in the front left pocket of defendant Ortega's jeans. Defendant Ortega was handcuffed, and Officer Smith seized three "eight-balls" of crack cocaine from his pocket.¹¹

Officer Smith then asked defendant Delgado, who was seated in the front passenger seat of the vehicle, to step out.

⁸ N.T. at 26.

⁹ N.T. at 26-28.

¹⁰ N.T. at 28-30, 142.

¹¹ N.T. at 34-35.

When defendant Delgado got out of the vehicle, Officer Smith smelled marijuana. In the course of a pat-down of defendant Delgado, Officer Smith felt cocaine in defendant Delgado's left front pocket. Defendant Delgado was handcuffed, and Officer Smith retrieved five eight-balls of crack cocaine.¹²

Both defendants were searched incident to arrest. During his search of defendant Delgado, Officer Smith seized two purple baggies of suspected marijuana.¹³

The officers called for a tow truck and for transport vehicles for the defendants. While they were waiting for those vehicles to arrive, Sergeant Monteiro shined his flashlight into the rear passenger vehicle of the Lincoln LS. He saw a firearm inside a map compartment on the back of the front passenger seat.¹⁴ Officer Smith also observed the firearm inside the map compartment.¹⁵

The Lincoln LS was towed, and the officers obtained a warrant to search the vehicle.¹⁶ Evidence seized from the vehicle included one Beretta .9mm handgun with ammunition inside the magazine; one Beretta .9mm handgun with a laser sight, loaded

¹² N.T. at 36-37.

¹³ N.T. at 108-109.

¹⁴ N.T. at 131-133.

¹⁵ N.T. at 40.

¹⁶ N.T. at 42.

with .9mm ammunition in the magazine and chamber; a clear plastic bag containing an unspecified amount of crack cocaine; and a functional cell phone.

The Beretta with the laser sight and the crack cocaine were recovered from a secret compartment in the center console, accessible only through the rear of the vehicle.¹⁷ The officers did not find evidence of burnt marijuana in the vehicle, nor did they find marijuana paraphernalia such as blunts, pipes, clips, lighters, or matches.¹⁸

CONTENTIONS OF THE PARTIES

Contentions of Defendants

Defendants contend that the officers lacked the requisite justification to frisk either defendant Ortega or defendant Delgado. Specifically, they assert that once the officers saw that Mr. Boston was not in the vehicle, they did not have a reasonable suspicion that criminal activity was afoot which would justify searching either defendant.

Moreover, defendants argue that the odor of marijuana only could have existed if it had been smoked in the vehicle. Thus, they contend that because no evidence of burnt marijuana and no smoking devices, matches or lighters were found in the vehicle, the officers could not have smelled marijuana smoke.

¹⁷ N.T. at 44-45.

¹⁸ N.T. at 65-66, 104.

Defendants further contend that it would be illogical to conclude that they discarded any such evidence to avoid arrest while retaining possession of cocaine. In addition, defendants assert that defendant Delgado's statement that he smoked marijuana earlier in the day did not form a reasonable basis upon which officers could conclude that criminal activity was presently afoot.

Defendants contend, in the alternative, that even if the officers had reasonable suspicion of marijuana use or impaired driving, they did not have reasonable suspicion that either defendant was armed and dangerous. Therefore, defendants contend, the officers lacked justification to frisk either defendant for weapons. Accordingly, defendants seek to suppress all evidence discovered and seized during the pat-down searches and subsequently.

Contentions of the Government

The government contends that once defendant Ortega opened the car window, Officer Smith had reasonable suspicion that a crime was being committed based on the odor of burnt or burning marijuana. The government further contends that, based on the totality of the circumstances, the officers had a reasonable suspicion that criminal activity was afoot and that defendants might be armed and dangerous. Therefore, the

government asserts that the pat-down search of each defendant was constitutionally permissible.

The government avers that defendants' presence in a high-crime area and the odor of marijuana smoke support a conclusion that the officers had reasonable suspicion to frisk both defendants. Moreover, the government contends that defendant Ortega had recently provided transportation to a fugitive (i.e., Khiry Boston); was behaving nervously; was reluctant to take his car out of reverse while the engine was running; and attempted to hide a portion of his body from view after exiting the vehicle. The government asserts that the totality of these circumstances gives rise to reasonable suspicion justifying a pat-down search of defendant Ortega.

Regarding defendant Delgado, the government argues that his admission that he recently possessed and used marijuana, considering the totality of the circumstances, supports a conclusion that the frisk was based on reasonable suspicion. Therefore, the government contends that the motion to suppress should be denied.¹⁹

¹⁹ Initially, the government also argues that the officers were justified in approaching the Lincoln LS because there was evidence of motor vehicle violations, including parking in front of a fire hydrant and the presence of tinted windows. For reasons discussed below at footnote 20, I do not address that argument in this Opinion.

DISCUSSION

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

U.S. Const. amend. IV.

Warrantless searches are presumptively unreasonable. United States v. Lockett, 406 F.3d 207, 211 (3d Cir. 2005). However, an officer may conduct a brief, investigatory stop when the officer has reasonable suspicion, based on articulable facts, that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See also United States v. Coker, 223 Fed.Appx. 136, 139 (3d Cir. 2007).

Moreover, officers may conduct a brief pat-down of a suspect's clothing if they have a reasonable suspicion that the individual may be armed or otherwise pose a threat to their safety. See Minnesota v. Dickerson, 508 U.S. 366, 372-374, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334, 344 (1993). To justify a protective pat-down, officers must identify an "articulable and objectively reasonable belief that the suspect is potentially dangerous". Michigan v. Long, 463 U.S. 1032, 1051, 103 S.Ct. 3469, 3482, 77 L.Ed.2d 1201, 1221 (1983).

Reasonable, articulable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence", and only a minimal

level of objective justification is necessary. United States v. Delfin-Colina, 464 F.3d 392, 396 (3d Cir. 2006) (citing Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 675-676, 145 L.Ed.2d 570, 576 (2000); United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989)). Thus, the question at issue is whether the officers in this case had the "minimal level of objective justification" necessary for a Terry stop and frisk. Sokolow, 490 U.S. at 7, 109 S.Ct. at 1585, 104 L.Ed.2d at 10.

In evaluating the constitutionality of a police traffic stop, the court must look at the totality of the circumstances to determine whether the detaining officers have a particularized and objective basis for suspecting legal wrongdoing. United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). Because whether an officer has reasonable suspicion to warrant a stop is often an "imprecise judgment", courts accord deference to an officer's judgment of whether criminal activity is taking place. United States v. Robertson, 305 F.3d 164, 168 (3d Cir. 2002).

Among other factors, the court may consider the officers' experience and the reputation of an area for criminal activity. United States v. Rickus, 737 F.2d 360, 365 (3d Cir. 1984). A defendant's nervous behavior may also be considered. See Johnson v. Campbell, 332 F.3d 199, 206 (3d Cir. 2003).

Moreover, furtive hand movements and a refusal to obey officers' orders may constitute suspicious behavior. See United States v. Moorefield, 111 F.3d 10, 14 (3d Cir. 1997).

Defendants contend that the officers lacked the requisite justification to frisk either defendant once it became clear to the officers that the person they were looking for, Khiry Boston, was not in the vehicle. The government contends that, considering the totality of the circumstances, the officers had reasonable suspicion to frisk defendant Ortega and defendant Delgado despite the fact that Mr. Boston was not in the vehicle. For the following reasons, and considering the totality of the circumstances, I agree with the government.

Officers Smith and Anuszewski, together with Sergeant Monteiro, approached defendants' vehicle looking for Mr. Boston. Defendants do not challenge the propriety of the officers' approach.²⁰ When the driver, defendant Ortega, opened the

²⁰ Although defendants characterize the encounter as an "illegal car stop" (see defendants' motion at paragraph 6), they offer no argument or facts to suggest that the officers' approach of the vehicle was illegal. Their motion avers at paragraph 5 that "[t]here was no probable cause to stop and continue to question Ortega where it was clear that the suspect that the police were looking for[,] Khiry Boston, was not in the vehicle." Defendants point to no facts indicating that the officers knew, before approaching the vehicle, that Khiry Boston was not inside.

Moreover, defendants' supplemental letter brief filed February 8, 2010 argues only that the officers lacked the requisite justification to frisk either defendant, and does not challenge in any way the initial stop. It also avers, at page 4, that "as soon as the driver-side window was lowered, it became apparent that Mr. Boston was not in the car....At this point, the original reason for the stop evaporated." However, this contention is belied by Officer Smith's testimony that the vehicle had tinted windows and was parked within fifteen feet of a fire hydrant, giving rise to suspected violations of the Pennsylvania Motor Vehicle Code. N.T. at pages 14-16, 19-24.

window, Officer Smith saw that Mr. Boston was not in the car.

The government does not contend that the ensuing pat-down search of each defendant was based on their original reason for the stop, i.e., looking for Mr. Boston. Rather, it contends that reasonable suspicion for continuing the stop beyond that point, including frisking each defendant, was based on several factors, including the presence of marijuana smoke inside the vehicle.

"[T]he smell of marijuana alone, if articulable and particularized, may establish not merely reasonable suspicion, but probable cause." United States v. Ramos, 443 F.3d 304, 308 (3d Cir. 2006). In Ramos, the court concluded that, for purposes of establishing reasonable suspicion, the odor of marijuana was sufficiently particularized where officers "smelled an identifiable marijuana odor" within three or four feet of defendants' car and, relying on their skill and experience, concluded that the odor was coming from the vehicle. Id.²¹

Defendants aver that "the odor of marijuana did not exist" inside the vehicle.²² Moreover, they contend that because officers found no evidence that marijuana had actually been smoked inside the Lincoln LS, they could not possibly have

²¹ See also United States v. Brown, 261 Fed.Appx. 371, 373 (3d Cir. 2008), which notes that, where a detective smelled marijuana coming from a car, "[t]his alone was enough to establish probable cause."

²² Defendants' supplemental letter brief, page 6.

smelled marijuana smoke and therefore there was no reasonable suspicion to search defendants. However, I credit Officer Smith's testimony that he smelled marijuana smoke and that defendant Delgado admitted to Officer Smith that he had smoked marijuana earlier in the day, and that the smoke was on his clothing.²³

Moreover, defendants cite no legal authority for the apparent proposition that the result of the search, i.e., whether evidence that marijuana had been smoked in the car was actually found, is a relevant factor in determining whether officers had reasonable suspicion to search. "In evaluating whether an officer had reasonable suspicion to seize a suspect, the court must consider the facts known to the officer at the time that the seizure occurred." United States v. Edwards, 2008 WL 4272631, at *2 (E.D.Pa. Sept. 9, 2008)(Padova, J.)(citing Johnson, 332 F.3d at 206).

²³ N.T. at 25-26. Defendants cite McMullen v. Tennis, 562 F.3d 231 (3d Cir. 2009) for the proposition that "simply stating '[I] smoked marijuana earlier in the day' does not give rise to reasonable suspicion of criminal activity. It does not, and cannot, stand alone as the sole basis for suspicion [of] criminal activity." (Defendants' supplemental letter brief, page 6.) They further cite McMullen in support of their contention that "For the corpus of a crime to be established, a mere statement by an individual claiming to have committed a crime is insufficient." Id.

Defendants do not offer a pinpoint citation and do not explain how McMullen supports these propositions. Moreover, a review of McMullen reveals that the case does not address the issues implicated in the case before me. However, even assuming defendants had offered case law in support of their argument that a statement that defendant Delgado had previously smoked marijuana does not give rise to reasonable suspicion that criminal activity is afoot, I conclude that, as discussed below, the officers had reasonable suspicion based on a totality of the circumstances. Those circumstances include, but are not limited to, defendant Delgado's statement that he had smoked marijuana earlier in the day.

Here, at the time of the search, Officer Smith knew from defendant Delgado's admission that he had recently smoked marijuana, and he could smell the odor of marijuana in the vehicle. This, on its own, established reasonable suspicion to continue the investigation beyond the point at which the officers realized that Mr. Boston was not in the vehicle. See Ramos, 443 F.3d at 308; Brown, 261 Fed.Appx. at 373. Moreover, I conclude that other factors support a finding of reasonable suspicion which justified the pat-down search of each defendant for weapons. See Michigan, supra.

Specifically, Officer Smith testified that, based in part on defendant Ortega's demeanor and the area they were in, he was concerned that defendant Ortega had a weapon. Officer Smith had previously seen defendant Ortega in a vehicle with Mr. Boston, who was wanted in connection with an attempted murder; defendants were located in a high-crime area; defendant Ortega did not immediately comply with Officer Smith's directive to put the car in "park"; and defendant Ortega seemed nervous and was sweating and mumbling.

Moreover, once defendant Ortega stepped out of the vehicle, he tried to conceal his left side by "blading", or turning away, from the officer, further arousing Officer Smith's suspicion that he may have possessed a weapon.²⁴ See Moorefield,

²⁴ N.T. at 31.

111 F.3d at 14. All of these factors gave rise to Officer Smith's articulable and objectively reasonable belief that defendant Ortega was potentially dangerous, therefore justifying the pat-down search. Michigan v. Long, supra.

Regarding defendant Delgado, Officer Smith testified that the amount of cocaine found on defendant Ortega, combined with the high-crime location, made him concerned that defendant Delgado might have a weapon. Specifically, he testified that in his experience, guns are frequently found on suspects and in cars where drugs are found.²⁵ I conclude that, based on these factors, Officer Smith had an articulable and objectively reasonable belief that defendant Delgado was potentially dangerous. Michigan v. Long, supra. Therefore, I conclude that the pat-down search of each defendant was justified.

In the course of each pat-down, Officer Smith identified, by feel, eight-balls of crack cocaine on each defendant. Although a pat-down search under Terry cannot be used purposely to discover contraband, "it is permissible that contraband be confiscated if spontaneously discovered during a properly executed Terry search." United States v. Yamba, 506 F.3d 251, 259 (3d Cir. 2007). Where a Terry search is justified, an officer "is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk,

²⁵ N.T. at 110.

until the officer is able reasonably to eliminate the possibility that the object is a weapon." Id. If the officer develops probable cause to believe that an object is contraband, he may perform a more intrusive search. "If, indeed, he discovers contraband, the officer may seize it, and it will be admissible against the suspect" so long as the search does not go "beyond what is necessary to determine if the suspect is armed." Id.

Because I conclude that the pat-down searches were properly executed, Officer Smith's seizure of crack cocaine from each defendant was permissible. Defendants do not contend that the pat-down search of either defendant went beyond what was necessary to determine whether either defendant was armed. Accordingly, I deny defendants' motion to suppress evidence seized as a result of each such search.

Finally, defendants assert that evidence seized subsequent to the pat-down searches should be suppressed as fruit of the poisonous tree. However, they do not challenge the validity of the search warrant obtained by the officers prior to searching the Lincoln, and because the pat-down search of each defendant was justified, I conclude that any evidence seized subsequently are not fruit of the poisonous tree. See United States v. Brown, 448 F.3d 239 (3d Cir. 2006).

Moreover, aside from their broad contention that all evidence seized subsequent to the pat-down searches should be

suppressed, defendants do not challenge the officers' seizure of marijuana from defendant Delgado as an improper search incident to arrest. Having properly seized crack cocaine during the course of a lawful pat-down search of defendant Delgado, the officers arrested him and, during a search incident to that arrest, seized marijuana.

Warrantless searches incident to arrest are permitted "to disarm a suspect in order to take him into custody" and "to preserve evidence for later use at trial". Knowles v. Iowa, 525 U.S. 113, 116, 119 S.Ct. 484, 487, 142 L.Ed.2d 492, 498 (1998). "[P]olice may search incident to arrest only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485, 491 (2009)(citing Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 685 (1960)).

Here, Officer Smith's search of defendant Delgado's person incident to his arrest revealed two bags of suspected marijuana. Defendants do not argue that defendant Delgado's person was not within his immediate control or that Officer Smith's search and seizure of the marijuana were not made for a proper purpose, i.e., to disarm defendant Delgado or to preserve destructible evidence.

Thus, because I have concluded that the pat-down searches yielded no "fruit of the poisonous tree", and because defendants do not contend that the searches of defendant Delgado and the vehicle were otherwise illegal, I also deny the motion to the extent it seeks suppression of all evidence seized subsequent to the pat-down searches.

CONCLUSION

For all the foregoing reasons, I grant defendant Girson Ortega's Motion to Join in the Co-defendant Jose Delgado's Motion to Suppress and I deny the Motion to Suppress and Memorandum of Law filed by defendant Jose Delgado and joined by defendant Girson Ortega.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	Criminal Action
)	No. 09-cr-209
vs.)	
)	
GIRSON ORTEGA (1),)	
and JOSE DELGADO (2),)	
)	
Defendants)	

O R D E R

NOW, this 8th day of July, 2010, upon consideration of the following motions and documents:

- (1) Motion to Suppress and Memorandum of Law filed July 9, 2009 by defendant Jose Delgado;
- (2) Motion to Join in the Co-defendant Jose Delgado's Motion to Suppress, which motion to join was filed September 25, 2009 by defendant Girson Ortega;
- (3) Government's Answer to Defendants' Pre-Trial Motion for Suppression of Evidence, which answer was filed November 6, 2009;
- (4) Supplemental letter brief filed February 8, 2010 by defendants; and
- (5) Government's Response to Defendants' Pre-Trial Motion for Suppression of Evidence, which supplemental memorandum was filed March 8, 2010;

after hearing conducted before the undersigned on November 23, 2009; and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that the Motion to Join in the Co-defendant Jose Delgado's Motion to Suppress is granted.

IT IS FURTHER ORDERED that Motion to Suppress and
Memorandum of Law is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge